

NOT FOR PUBLICATION

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HAROLD S. MARENUS, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

Argued and Submitted on June 22, 2007 at San Francisco, California

Filed - July 24, 2007

Appeal from the United States Bankruptcy Court for the Northern District of California

Honorable Marilyn Morgan, Bankruptcy Judge, Presiding

Before: KLEIN, SMITH and DUNN, Bankruptcy Judges.

^{*}This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

A judgment debtor on a money judgment issued by the bankruptcy court appeals the judgment enforcement order requiring funds held in a bank account to be delivered by the sheriff to the appellee, judgment creditor. We AFFIRM.

FACTS

On September 12, 2005, the appellant/debtor, Kenneth Doolittle, filed a voluntary chapter 7 bankruptcy petition in the Northern District of California.

The debtor is a financial advisor and licensed real estate broker who sold used mobile homes and serviced deeds of trust on mobile homes by accepting principal and interest payments from buyers and making the payments to the seller clients who financed the sales.

The debtor also solicited and managed investments in trust deeds. From 1992 to 2002, the appellee, Madilyn Clifft, entrusted more than \$200,000.00 to the debtor to invest on her behalf. The debtor, however, used the appellee's funds to pay his expenses. The appellee obtained a \$265,501.88 judgment against the debtor from the bankruptcy court, which debt the court determined to be nondischargeable under 11 U.S.C. § 523(a)(2).

On August 29, 2006, pursuant to a writ of execution, the appellee levied on six of the debtor's bank accounts at Coast Commercial Bank ("Bank") in Aptos, California. Funds in four of the accounts were not remitted to the sheriff by the Bank because they were expressly designated as trust accounts, which are not

subject to levy in California.¹ A fifth account, held jointly by the debtor with his spouse, was levied upon in the amount of \$9.75.

The disputed account, which was expressly designated as "Mobile Home Service Account," was levied upon in the approximate amount of \$70,000.00 ("Funds").

On September 7, 2006, the debtor filed a claim of exemption, asserting that the "Mobile Home Service Account" is a trust account that by statute is not subject to enforcement of a money judgment because it is not assignable or transferable. Cal. Civ. Proc. Code § 695.030(a).

The debtor contended that his Mobile Home Service Account was used to service trust deeds on mobile homes that represented seller carryback financing. The debtor stated that he would collect and deposit mobile home buyers' principal and interest payments into the account and make the payments to the trust deed owners in the same amounts, deducting only his service fee. In a further brief, the debtor added that the Funds in the account were his clients' money, and not his. The debtor also attested that he voluntarily conformed his handling of the accounts to service seller carryback financing loans on the mobile homes to real estate brokers trust account regulations.

The evidentiary hearing regarding the judgment enforcement dispute was held on October 19, 2006, and an order was entered on October 26, 2006. At the hearing and in opposition papers, the

¹The names of the accounts were as follows: "Real Estate Trust Account," "Broker Real Estate Trust Acct. II," "Mobile Home Escrow Trust Account," and "Mobile Home Trust Account."

appellee contended that the debtor's "Mobile Home Service Account" did not constitute a legal trust fund for funds held by a licensed real estate broker under Cal. Bus. & Prof. Code \$ 10145(a)(1). Appellee also presented evidence that the debtor had paid her \$537.35 from the disputed account, even though her investment was not maintained in that account. As such, the appellee argued that the Funds in the disputed account were assignable or transferable, hence, subject to execution.

The bankruptcy court ruled that the Funds in the mobile home service account "are subject to levy because the account was not properly set up as a trust account" and ordered the sheriff to deliver the funds to the appellee. The court reasoned that what constitutes a trust account is strictly construed under applicable California law. The court was not persuaded that the debtor's mobile home service account was a trust account and not the debtor's personal account. It took particular note that funds from that account had been transferred to the appellee, even though her investment was not serviced through that account.

After the debtor timely appealed, on January 9, 2007, we granted a stay pending appeal to maintain the status quo with

²With respect to the balance of the bank accounts levied, the bankruptcy court ordered that the proceeds of the joint account in the amount of \$9.75 be remitted to the levying officer and delivered to the appellee; and ordered that the funds in the remaining four accounts, which were found properly set up as trust fund accounts, be released from levy and returned to the debtor.

 $^{^3}$ The court based its ruling on Cal. Civ. Proc. Code \$ 695.010(a) and \$ 695.030(a), Cal. Fin. Code \$ 17410(a), Cal. Bus. & Prof. Code \$ 10145(a), 10 Cal. Code Reg. \$ 2832(a), and 1 Res. Mort. Lend. State Reg. Man. West Cal. \$ 2:35.

respect to the Funds on the conditions that a procedural defect be corrected and the debtor post a bond in the amount of \$7,000.00, or deposit \$7,000.00 in the bankruptcy court registry, sufficient to cover the monetary loss that appellee will likely suffer as a result of the issuance of the stay, plus costs on appeal.⁴

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JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. \S 1334. We have jurisdiction under 28 U.S.C. \S 158.

ISSUE

Whether the Funds held in the debtor's "Mobile Home Service Account" in the approximate amount of \$70,000.00 are funds that cannot be assigned or transferred, and thus, are not subject to enforcement of a money judgment.

STANDARD OF REVIEW

The question of whether money in a bank account is not assignable or transferable, and thus, not subject to enforcement of a money judgment is a mixed question of law and fact that is reviewed de novo. See Murray v. Bammer, 131 F.3d 788, 792 (9th Cir. 1997).

 $^{^4}$ The bankruptcy court docket does not reflect whether a \$7,000.00 bond was posted or \$7,000.00 was deposited in the bankruptcy court registry.

DISCUSSION

Before discussing whether the debtor's Funds in his "Mobile Home Service Account" are property subject to enforcement of a money judgment, we canvas the procedure for enforcing a judgment of the federal court for the payment of money.

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Federal money judgments are enforced through the procedures prescribed by state law. Fed. R. Civ. Proc. 69. California judgment enforcement law is followed when enforcing a money judgment rendered by a federal court sitting in California, except to the extent a federal statute applies or enforcement is stayed under Fed. R. Civ. Proc. 62. Cal. Prac. Guide Enf. J. & Debt Ch. 6A-2. Judgment creditors who have obtained a writ of execution from a federal court may use state law procedures to collect debts under Fed. R. Civ. Proc. 69(a). Id. In the case before us, the appellee obtained a writ of execution from the bankruptcy court. Accordingly, California law applies to the appellee's ability to enforce her money judgment against the debtor.

The correct method to contest whether the debtor's account is exempt from levy is the claim of exemption procedure

⁵Federal Rule of Civil Procedure 69(a) provides:

The procedure on execution . . . in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

prescribed by Cal. Civ. Proc. Code § 695.040: "Property that is not subject to enforcement of a money judgment may not be levied upon," and if levied upon, "the property may be released pursuant to the claim of exemption procedure provided in Article 2 (commencing with Section 703.510) of Chapter 4." Property that is not subject to enforcement of a money judgment is exempt without making a claim. Cal. Civ. Proc. Code § 704.210. At a hearing on a claim of exemption, the exemption claimant has the burden of proof. Cal. Civ. Proc. Code § 703.580(b).

Specific California code provisions provide the framework for whether the debtor's Funds are the type of property subject to enforcement. Section 695.010(a) states that, "Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment." Cal. Civ. Proc. Code § 695.010(a). "Property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment." Cal. Civ. Proc. Code § 695.030(a).

Moreover, Cal. Fin. Code § 17410(a) provides that "trust funds are not subject to enforcement of a money judgment arising out of any claim against the licensee or person acting as escrow agent."

These statutes reflect the long-established rule that in California, trust property is not the subject of seizure and sale under judgment and execution against the trustee. See Townsend v. Greeley, 72 U.S. 326, 337 (1866) (applying California law).

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Whether the Funds in debtor's mobile home service account constitute property in a trust account, that is not assignable or transferable, is the key issue. The outcome will determine whether the Funds in this account are subject to enforcement of the appellee's money judgment against the debtor under California law.

In California, no particular words, such as "trust" or "trustee," are necessary to create a trust. See Placerville

Fruit Growers' Ass'n v. Irving, 287 P.2d 793, 797 (Cal. Ct. App. 1955). However, the requirements are stricter for brokers dealing with real estate transactions. Section 2.35 of the Residential Mortgage Lending State Regulation Manual dated April 2007, addressing trust fund accounting in connection with loan servicing practices, states that Cal. Bus. & Prof. Code \$ 10145(a)(1) and the related provision in the California Administrative Code require that a "trust account must be designated as such in the name of the . . . licensee as trustee." 1 Res. Mort. Lend. State Reg. Man. West Cal. \$ 2:35.

⁶The five elements required to create an express trust are: 1) a competent trustor, 2) trust intent, 3) trust property, 4) trust purpose, and 5) a beneficiary. See Keitel v. Heubel, 103 Cal. App. 4th 324, 337 (Ct. App. 2002).

 $^{^{7}\}mathrm{Section}$ 10145(a)(1) of the California Business and Professional Code provides:

A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or (continued...)

If there is not an adequate writing, as in the account now in issue, then any trust would have to be an oral trust. By California statute, proof of "the existence and terms of an oral trust of personal property may be established only by clear and convincing evidence." Cal. Prob. Code § 15207(a). Furthermore, "the oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property." Cal. Prob. Code § 15207(b).

By statute, the exemption claimant has the burden of proof to establish the claimed exemption. Cal. Civ. Proc. Code \$ 703.580(b).

The debtor did not expressly designate the account as a "trust" account, but merely designated it as "Mobile Home Service Account." Thus, under California law, the debtor has the burden

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into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

Cal. Bus. & Prof. Code § 10145(a)(1).

Section 2832(a), Title 10 of the California Administrative Code provides:

Compliance with Section 10145 of the Code requires that the broker place funds accepted on behalf of another into the hands of the owner of the funds, into a neutral escrow depository or into a trust fund account <u>in the name of the broker</u>, . . . as trustee. . . .

10 Cal. Code Reg. § 2832(a) (emphasis added).

to prove, by clear and convincing evidence, that the Funds in the "Mobile Home Service Account" qualify as personal property held in an oral trust, not assignable or transferable, and accordingly, exempt from enforcement of a money judgment.

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The debtor contends that the account constitutes a trust account because of the way he uses the Funds, even though it is not expressly designated as a trust account. He maintains that he uses the "Mobile Home Service Account" to service mobile home trust deeds by depositing buyers' principal and interest payments into the account and making payments to the owners of the trust deeds in the same amounts, minus his service fee. Thus, he argues that the money is not his money and not subject to enforcement under Cal. Civ. Proc. Code § 695.030(a).

In opposition, the appellee contends that the debtor's "Mobile Home Service Account" does not constitute a trust account for California judgment enforcement purposes, because it is not properly identified as such, as is required for the activities of a licensed real estate broker under Cal. Bus. & Prof. Code \$ 10145(a)(1). The appellee further argues that the debtor set up the account in his name, for his own business purposes, and is free to take funds at any time. If the debtor can assign and transfer the Funds from this account at his discretion, then the appellee argues that the Funds qualify as property subject to enforcement.

If California real estate laws and regulations apply to the debtor's account, then the "Mobile Home Service Account" does not comply with the requirements of a trust account because it was not expressly designated as such.

Furthermore, the debtor had four other accounts in the same Bank, which he specifically designated as "trust" accounts. The debtor's omission to state explicitly that the "Mobile Home Service Account" was a trust account indicates that the debtor had the ability freely to assign and transfer the Funds.

Property that is freely assignable and transferable is subject to enforcement of a money judgment under California law. See Cal. Civ. Proc. § 690.010(a) and § 690.030(a).

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The debtor contends, however, that California law and regulations for real estate brokers do not apply when the loans supposedly being serviced are for the purchase of <u>personal</u> property (i.e., mobile homes not on foundations), not real property.⁸

The flaw in this argument is that the debtor nonetheless submits that he conforms his practice for servicing mobile home trust deeds to the requirements of real estate trust deeds. It follows that, if the debtor truly conformed his business of servicing mobile home trust deeds to the requirements of real estate trust deeds, as he claims, then the debtor would have explicitly created the mobile home service account to be a "trust" account, especially in light of the evidence that he expressly created four other trust accounts at the same bank. By not doing so, it is reasonable to infer that the debtor was not binding himself to hold the Funds in trust. If the Funds are not held in a trust account, then the Funds are not protected against

[%]Miller & Starr California Real Estate Section 31:3 states
that a mobile home not installed on a foundation is personal
property. 11 Cal. Real Est. § 31:3 (3d ed. 2007).

enforcement of a money judgment.

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Even if we were to accept that the debtor was not required to hold himself to the regulations of real estate brokers in his mobile home service business, the debtor would still have to prove by clear and convincing evidence that an oral trust of the Funds had been created and that money in that account had not been freely assigned or transferred at his discretion. The bankruptcy court was not convinced. We cannot say that this was error.

The evidence submitted by the debtor himself is not sufficiently comprehensive or conclusive as to the details of transfers and daily use of the account. As the appellee contends, the fact that debtor only submitted one bank statement from the disputed account, one deposit receipt, and one summary of monies deposited to the account on one day, all with differing dates, is persuasive, and tends to corroborate the position that the account was not set up as a trust account in the first place.

The appellee also argues that the debtor's lack of explanation for two telephone transfers of funds out of the disputed account in the amounts of \$9,000.00 and \$15,000.00 on August 14, 2006 and August 15, 2006, indicate the debtor removed these funds for some purpose other than the putative trust purpose.

In addition, what the bankruptcy court described as "the most compelling factor" supporting its conclusion that the debtor's mobile home service account was not a trust account, was the appellee's declaration testimony indicating that the debtor had previously made a \$537.35 payment to the appellee from the

disputed account, although her investment was not maintained in that account. The bankruptcy court's inference in this regard was correct.

Taken altogether, we are persuaded that the bankruptcy court correctly concluded that the debtor did not meet his burden of proof by clear and convincing evidence. The evidence supports the conclusion that the Funds in the mobile home service account could be freely assigned and transferred, which is consistent with the appellee's testimony, documenting an actual use contrary to the purported trust. As such, the Funds are subject to enforcement of appellee's money judgment under California law.

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III

Where an account is not specifically labeled as a "trust" account, courts sometimes may imply a trust so as to prevent unjust enrichment and to ensure that legal formalities do not frustrate the original intent of the transacting parties. A resulting trust or a constructive trust may be imposed as an equitable remedy. See generally Ins. Co. of the West v. Simon (In re Foam Sys. Co.), 92 B.R. 406, 409 (9th Cir. BAP 1988); Burlesci v. Peterson, 68 Cal. App. 4th 1062, 1069 (Ct. App. 1998); 13 Witkin, Summary of Cal. Law, Trusts, \$ 311 (10 ed. 2005); 76 Am. Jur. 2d Trusts \$ 135 (West 2007). The court's ability to impose a constructive trust is also codified in California statutes. See Cal. Civ. Code \$\$ 2223 and 2224.9

(continued...)

 $^{^9}$ Section 2223 provides that, "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Cal. Civ. Code § 2223.

The debtor argues that a resulting trust should be imposed by the court for the benefit of the third parties whose money is held in his "Mobile Home Service Account." In contrast, the appellee contends that the debtor should not be afforded the remedy of any "constructive" type trusts, either resulting trust or constructive trust, because the debtor has cited no authority for his proposition, and the debtor is not in the position to make his claim of exemption on behalf of unidentified third parties who have made no claim themselves.¹⁰

Because resulting trusts and constructive trusts are equitable remedies imposed by the court, it makes sense for the court to consider whether implying a trust by law comports with

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Section 2224 provides:

One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

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Cal. Civ. Code § 2224.

10The appellee contends that, if any third parties had a claim to these Funds, they should have appeared in the trial court after levy. A constructive trust compels the transfer of property from the person wrongfully holding it to the rightful owner. Burlesci, 68 Cal. App. 4th at 1069. For a court to impose a constructive trust, the following three conditions must be satisfied: 1) the existence of a trust res (property or some interest in property); 2) the right of a complaining party to that res; and 3) some wrongful acquisition or detention of the res by another party who is not entitled to it. Id. The appellee argues that the debtor should not be protected against execution by creditors because the third prong has not been satisfied, and the debtor is not the person who can raise this claim on behalf of these unidentified third parties.

public policy. The bankruptcy court reasoned that the purpose and objective of real estate regulations was to protect the public from the damages and loss incident to dealing with an incompetent or untrustworthy real estate practitioner. As the debtor himself stated that he conformed his mobile home financial servicing practice to that of real estate transactions, the bankruptcy court concluded that, "Allowing the debtor to operate using an account that is not a formal trust account subjects his clients to risks for which there is no expedient remedy. Here, there are no safeguards to insure that the debtor does not use the mobile home service account at his sole discretion."

(Hearing Tr. 9:21-25, Oct. 19, 2006.) We agree.

The mobile home service account does not merit the remedy of imposing a constructive trust or a resulting trust. Thus, the Funds in debtor's mobile home service account is property subject to enforcement of appellee's money judgment.

CONCLUSION

The debtor has failed to prove by clear and convincing evidence that the Funds held in the debtor's "Mobile Home Service Account" were not freely assignable or transferable. Thus, the approximate \$70,000.00 held in the account is subject to enforcement of the appellee's money judgment. AFFIRMED.